

<b>JOHN H. BROWN</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 217,980
<b>LABUS DRYWALL, INC.</b>	)	
Respondent	)	
AND	)	
	)	
<b>AMERICAN FAMILY INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

Respondent requested Appeals Board review of the preliminary hearing Order entered by Administrative Law Judge John D. Clark on December 17, 1996.

Respondent questions whether claimant's current need for shoulder surgery resulted from an accidental injury that arose out of and in the course of his employment.

After reviewing the preliminary hearing record and considering the briefs of the parties, the Appeals Board finds as follows:

The issue raised by the claimant is an issue set forth in K.S.A. 1996 Supp 44-534(a) that grants the Appeals Board jurisdiction to review a preliminary hearing order.

Claimant fell while working for the respondent as a drywall finisher on September 5, 1995. Claimant bruised his hip and noticed a couple of days thereafter some discomfort in both of his shoulders. Claimant reported the fall to the respondent but did not request medical treatment. Claimant continued to perform his regular job duties for the respondent until he was laid off in January 1996 for reasons not associated with his injuries September 1995.

Following his layoff, claimant immediately started working as a drywall finisher for his present employer, TCB Drywall. After claimant had worked a few weeks for TCB Drywall, he sought medical treatment for his shoulder symptoms from his family physician, Dr. Windholz. Dr. Windholz treated claimant conservatively with anti-inflammatory medication and physical therapy. Claimant testified it was his understanding that the respondent's insurance carrier paid for Dr. Windholz's treatment and physical therapy.

Respondent's insurance carrier eventually referred claimant for examination and treatment with orthopedic surgeon, Harry A. Morris, M.D. Dr. Morris saw claimant on May 1, 1996, for bilateral shoulder complaints. Dr. Morris's impression at that time was impingement symptoms of the shoulder aggravated by claimant's overhead work. Dr. Morris recommended conservative treatment in the form of anti-inflammatory medication, physical therapy and an injection to claimant's left shoulder.

On September 6, 1996, after a review of claimant's radiographs, Dr. Morris diagnosed claimant with type III acromions, rather significantly hooked. Dr. Morris' medical note at that time indicated that he discussed possible surgery with the claimant. Dr. Morris also noted that the claimant's overhead work was certainly an aggravating factor. Finally, Dr. Morris scheduled claimant for decompression acromioplasty to repair claimant's left shoulder on January 21, 1997.

Claimant testified at the preliminary hearing which was held on December 17, 1996, that he was continuing to work for his current employer, TCB Drywall. However, he further testified he was restricted from lifting the heavy drywall and his work was limited to light duty, taping and finishing.

The Administrative Law Judge ordered respondent to provide the requested medical treatment with Harry A. Morris, M.D., including surgery and ordered all medical paid. He also ordered temporary total disability to be paid if claimant was taken off work.

Respondent denies liability for claimant's present need for medical treatment and surgery for claimant's bilateral shoulder condition. Respondent contends the bilateral shoulder injuries and the need for the medical treatment are a result of claimant's work activities he performed while working for his present employer, TCB Drywall. Respondent acknowledges claimant fell on September 5, 1995, while he was working for the respondent and the fall resulted in claimant's shoulder becoming symptomatic. However, respondent points out that the claimant was able to perform his regular work activities as a drywall finisher at that time without restrictions and did not require medical treatment. Respondent asserts claimant's shoulder symptoms increased as he continued to work for his present employer, TCB Drywall. Such symptoms have now worsened to the point claimant is restricted from heavy lifting and limited to the light duty, taping and finishing. Furthermore, Dr. Morris' medical treatment notes indicate that claimant's present overhead work activities have aggravated his shoulder condition. Respondent concludes this aggravation has caused claimant's shoulder conditions to have permanently worsened. The shoulder conditions have now worsened to the point that Dr. Morris has decided the appropriate medical treatment is surgery.

Claimant has alleged he sustained an initial injury to his shoulders on September 5, 1995, with continuing aggravation each and every workday thereafter. The Appeals Board finds the preliminary hearing record as a whole, which includes claimant's testimony and the medical records of Dr. Morris, has established claimant had a pre-existing shoulder problem when he went to work for his present employer, TCB Drywall, in January 1996. The shoulder problem at that time did not require medical treatment and claimant was able to continue with his regular work activities. However, after he was employed by TCB Drywall, claimant's work activities aggravated the shoulder problem and accelerated to the point of a need for surgical intervention.

Accordingly, the Appeals Board finds claimant's current need for surgery arises out of and in the course of his employment with his present employer, TCB Drywall, and not the respondent. The Appeals Board finds claimant's everyday working activities while working for TCB Drywall have aggravated his shoulder condition during the months that he has been employed by TCB Drywall in 1996. Therefore, Appeals Board finds the appropriate date of accident in this case will be the last day claimant worked before surgery which will be January 20, 1997, if surgery was performed as scheduled on January 21, 1997. See Condon v. The Boeing Co., 21 Kan. App. 2d 580, 903 P.2d 775 (1995) and Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order of Administrative Law Judge John D. Clark dated December 17, 1996, should be and is reversed and claimant's request for preliminary compensation benefits is denied.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of February 1997.

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BOARD MEMBER

c: Phillip R. Fields, Wichita, KS  
William L. Townsley III, Wichita, KS  
John D. Clark, Administrative Law Judge  
Philip S. Harness, Director